STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 20,798
	)	
Appeal of	)	

INTRODUCTION

The Department of Aging and Disabilities (DAIL) filed a Motion to Reconsider the Hearing Officer's proposed Recommendation in the above case dated July 9, 2007. The Board remanded the Motion to the Hearing Officer for further consideration at its meeting on July 18, 2007. Petitioner filed a responsive memorandum in opposition to the Motion on July 30, 2007.

In addition, the Hearing Officer's proposed Recommendation included a remand for a discrete issue, the amount of Instrumental Activities of Daily Living (IADLs). DAIL supplemented the record on August 22, 2007. Petitioner submitted legal argument on August 22, 2007 and DAIL submitted legal argument on August 23, 2007.

The decision below will separately address both the Motion to Reconsider and the Remand dealing with the IADLs.

MOTION TO RECONSIDER

DAIL's Motion to Reconsider shows a continuing misunderstanding of the role of the Human Services Board, the nature of federal Medicaid law, and the burden of proof in this case.

The Legislature created the Board as a separate entity to hear appeals from petitioners aggrieved by Department action. 3 V.S.A. § 3091(a). In particular, the Board's statutory duties include looking at whether a Department's actions are in conflict with federal or state law. 3 V.S.A. § 3091(d), Stevens v. Department of Social Welfare, 159 Vt. 408, 416 (1992).[1] It has been repeatedly held that the Board owes no deference to any departments in the Agency of Human Services in interpreting federal laws. Brisson v. Dept. of Social Welfare, 167 Vt, 148, 152 (1997); Cushion v. Dept. of PATH, 174 Vt. 475 (2002); and Jacobus v. Department of PATH, 177 Vt. 496, 502 (2004).

In recent fair hearings involving the same underlying legal issues, the Board has been called upon to analyze whether DAIL's actions have been in conflict with federal

[1] The Board has previously addressed its authority to determine whether Department actions in other Medicaid waiver programs (VHAP) were in violation of federal and state law. See Fair Hearing Nos. 16,748; 20,241; and 20,360.

law. Fair Hearing Nos. 20,148 & 20,676 and Fair Hearing No. 20,711. There is no reason why it cannot, and should not, do so here.

The Choices for Care (CFC) Program is a Section 1115 Medicaid Waiver Program. DAIL continues to argue that the CFC program is not a Medicaid program and is not governed by federal Medicaid law. In addition to previous arguments that were addressed in Fair Hearings 20,148 and 20,676 and Fair Hearing No. 20,711 as well as the original Recommendation in this case, DAIL adds the novel argument that the Board should not reference Medicaid law (including Medicaid waivers) because the CFC program is "unique". All these arguments are unavailing.

The underlying purpose of Medicaid waiver programs is to allow states to experiment and see if there are other methods to meet underlying Medicaid goals. Vermont has a proud tradition of seeking federal approval for Medicaid waivers including Dr. Dynasaur and the Vermont Health Access Program.

Here, DAIL was granted permission to create the CFC program as a Medicaid waiver program pursuant to 42 U.S.C. § 1396n. DAIL is bound by federal Medicaid law except to the extent specific federal provisions are waived by the Centers for Medicare and Medicaid Services in the operation of the

CFC program. 42 U.S.C. § 1315; Boulet v. Celluci, 107 F.Supp. 2d 61 (D. Mass. 2000).

Despite DAIL's arguments to the contrary, the provision of personal care services pursuant to the CFC program is defined as medical assistance. 42 U.S.C. §§ 1396N(c)(1) and 1396(d)(4).

Moreover, despite DAIL's arguments to the contrary, a recipient's underlying health is a continuing factor in the provision of CFC services. In terms of Medicaid waiver programs for home health care programs intended to prevent institutionalization, Congress has charged state agencies "to protect the health and welfare of individuals provided services under the waiver". 42 U.S.C. § 1396n(c)(2)(A). This charge is incorporated in the CFC regulations at Regulation II and VII.B.6.

As a result, medical evidence can be considered to determine whether the level of services is sufficient to protect the petitioner. A doctor need not complete a functional assessment nor be fully conversant with the CFC program to offer evidence that is relevant to a particular case. V.R.E. § 401. A doctor's evidence can explain impacts upon petitioner's health if particular services are reduced or not adequately provided. There is normally a connection

between an individual's health and that individual's functional capacity.

In petitioner's case, the testimony of her treating physician, Dr. M.R., provided relevant evidence as more fully set out in the proposed decision. Dr. M.R.'s testimony was one piece of the evidence petitioner provided in support of her case and was, especially helpful, in understanding the dangers to petitioner's health if she did not receive the appropriate amount of time for toileting services.

Moreover, DAIL has the burden of proof whether a reduction of services is warranted. Human Services Board Rule No. 11. Petitioner was grandfathered into the CFC program in 2005 after receiving services through the Home and Community Based Waiver program; the underlying regulations governing the annual reassessment of needs and the use of variances to allow for an individualized determination of services are the same. The CFC regulations charge DAIL to do an individualized assessment. CFC Regulation VII.B.6. The scope of the Board's purview stems from the actions taken in reference to that individualized assessment.

When DAIL conducted the annual reassessment for the 2006-2007 service year, DAIL started with a baseline determination of petitioner's service needs from prior years.

Having established a baseline, DAIL cannot now reduce services (including variances) without a showing that a change has occurred and that the change justifies a reduction of services.

Changes can include a regulatory change such as changes to regulations governing underlying eligibility or assessment criteria; this type of change has not occurred here. Changes can include an improvement in the petitioner's condition so that she no longer needs the same service; this change has not occurred. Changes can include other programs picking up coverage of CFC services; DAIL did not show that this change occurred. Changes can come from correcting past mistakes; DAIL did not show past mistakes regarding coverage of Activities of Daily Living (ADLs).[2]

Other than repeating its position, DAIL has provided no new or compelling reason for the Board to reconsider these matters of evidence and law that were fully addressed in the Hearing Officer's prior Recommendation.

REMAND OF IADLS

As part of the CFC program, recipients may receive up to 330 minutes per week for IADLs. CFC Regulations VII.A.2.

[2] DAIL provided testimony that they made a mistake in calculating the IADLs for the 2005-2006 service year; IADLs will be addressed infra.

IADLs include phone use, money management, household maintenance, housekeeping, laundry, shopping, transportation, and care of adaptive equipment.[3] CFC Regulations III.28. Recipients may request variances if their health and welfare will be impacted by capping the IADLs at 330 minutes per week. Unfortunately, the regulations are silent regarding how the IADL time limit is to be divided between various activities.

During the 2005-2006 service year, petitioner was granted a variance of an additional 150 minutes per week for transportation because of the number and location of her medical appointments and an additional 180 minutes per week for shopping because she has to travel out of county for groceries and pain medications. Petitioner was granted a total of 660 minutes per week for IADLs.

During the 2006-2007 service year, petitioner was granted a variance of 160 minutes per week for transportation and 180 minutes per week for shopping. Petitioner was granted a total of 545 minutes per week for IADLs representing a decrease of 115 minutes per week.

[3] Although meal preparation and medication management are IADLs, they are not included in the 330 minute time limit.

B.S., the Long Term Care Clinical Coordinator (LTCCC), approved the requests for both service years. B.S. testified that she made a mistake for the 2005-2006 service year by double counting time for shopping and transportation. A discrepancy between B.S.'s testimony and the breakdown of the IADLs in B.S.'s notes on petitioner's 2005-2006 variance request was referenced in proposed finding of fact number 14; the discrepancy led to a remand.

DAIL submitted additional testimony from B.S. by affidavit in which B.S. stated that she included sixty minutes for transportation and sixty minutes for shopping into the 330 minutes per week for IADLs. When B.S. calculated the IADLs for the 2006-2007 service year, she counted 120 minutes of the 180 minutes for transportation towards the variance. In terms of shopping, she counted 100 minutes of the 160 minutes towards the variance. She stated she also reduced phone use by five minutes per week leading to a net gain of 215 minutes per week. B.S. determined the IADLs for the 2006-2007 service year should be 545 minutes per week by adding 215 minutes to the base of 330 minutes per week.

The problem is that there is still a discrepancy between the testimony and the documentary evidence submitted at

hearing. When the IADLs in the 2005-2006 service year are added, they total 605 minutes every week.[4] The IADLs in the 2006-2007 service year total 545 minutes every week as a result of reductions to money management, housekeeping and laundry and adaptive equipment.[5]

The documentary evidence best presents the picture of how the IADLs were allotted each year as they are contemporaneous with the reassessments. Based on the documentary evidence, a mistake was made for the 2005-2006 service year. The evidence supports a finding of 605 minutes per week for IADLs. Based on the overall evidence in the case, the corrected amount of 605 minutes per week should be continued for the 2006-2007 service year.

CONCLUSION

In conclusion, DAIL's Motion to Reconsider is denied. In addition, the Decision is amended consistent with this decision to find that the appropriate level of IADLs is 605 minutes per week.

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[4] The weekly minutes are noted as follows: phone use (0 minutes), money management (15), household management (60), housekeeping and laundry (180), shopping (180), transportation (150), and adaptive equipment (20).
[5] The weekly minutes are noted as follows: phone use (0), money management (10), household maintenance (60), housekeeping and laundry (120), shopping (180), transportation (160), and adaptive equipment (15).